Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundling of Local Exchange Carrier	)	**RM-8614**
Common Line Facilities	)	

MFS COMMUNICATIONS COMPANY, INC.'S
<u>REPLY TO COMMENTS ON PETITION FOR RULEMAKING</u>

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MFS Communications Company, Inc. ("MFS"), by its undersigned counsel, hereby responds to the comments filed in opposition to its above-captioned Petition For Rulemaking by the New York State Department of Public Service ("NYDPS"), Pennsylvania Public Utility Commission ("PAPUC"), Maryland Public Service Commission ("MDPSC"), National Association of Regulatory Utility Commissioners ("NARUC") (hereinafter collectively referred to as "State Regulatory Commissions") and the United States Telephone Association ("USTA"), Pacific Companies, Ameritech, BellSouth Telecommunications, Inc. ("BellSouth"), NYNEX Telephone Companies ("NYNEX"), Bell Atlantic Telephone Companies ("Bell Atlantic"), GTE, and Southwestern Bell Telephone Company ("SWBTC") (hereinafter collectively referred to as the "LECs").[1/]

1/ Numerous parties, including AT&T Corporation, MCI Telecommunications Corporation, Sprint Corporation, LDDS, Teleport Communications Group, Inc., Allnet Communications Services, Inc., Competitive Telecommunications Association, Cox Enterprises, Inc., Fiberlink, Inc., Intermedia Communications of Florida, Inc. and McLeod Telemanagement, Inc., filed comments supporting MFS' Petition For Rulemaking. Certain of these parties contend that MFS' Petition does not go far enough or raise additional issues that the Commission should consider. MFS limits its reply to the State Regulatory Commissions' and LECs' arguments urging denial of the Petition, but submits that the Commission should not delay action on its Petition in order to consider the additional issues raised by the other parties.

SUMMARY

In its Petition for Rulemaking, MFS requests that the Commission adopt rules requiring Tier 1 LECs (except NECA pool members) (1) to provide the common line element of interstate switched access service -- i.e., the "local loop") -- on an unbundled basis to competing state-certified providers of switched local exchange service, (2) to permit interconnection to such loops via tariffed expanded interconnection arrangements consistent with the existing rules for special and switched access, and (3) to comply with uniform minimum technical criteria to ensure compatibility between the networks of incumbent LECs and new entrants. In addition, MFS has proposed that the Commission adopt rules governing the pricing of the interstate portion of the common line element and voluntary guidelines for the pricing of the intrastate portion. Such rules would be a natural adjunct to the expanded interconnection rules, which require the LECs to unbundle special and switched access circuits and to provide direct trunkside interconnection to their switching facilities. Unbundled access to the third element of the LECs' local exchange bottleneck at cost-based rates will serve the public interest by extending the benefits of competition to interstate switched access users and end users in the near term without the costly and inefficient duplication of the incumbent LECs' ubiquitous local loop facilities.

MFS showed, and certain LECs confirmed, that there are no technical impediments to loop unbundling. The Commission is uniquely positioned to continue its leadership in promoting competition in the provision of telecommunications services by complementing state initiatives that have authorized local exchange competition. Uniform technical standards will ensure efficient interconnection and the promulgation of pricing rules and guidelines will discourage the LECs from engaging in anticompetitive pricing practices.

No party has offered a persuasive reason for the denial of MFS' Petition.[2/] The State Regulatory Commissions and the LECs oppose Commission intervention on the grounds that (1) unbundling of the local loop falls within the exclusive jurisdiction of the states, (2) the Commission has no authority to preempt the states on technical and interconnection issues, (3) the LECs' refusal to unbundle the common line element is not inconsistent with antitrust policies and (4) the local loop is not a bottleneck. These arguments ignore a long line of precedent recognizing the Commission's power to regulate those aspects of physical telecommunications facilities that are incapable of being separated between the state and federal jurisdictions. Moreover, by forcing carriers to purchase functions and services -- i.e., switching and local usage -- that they neither want nor need in order to obtain access to the local loop, the LECs' are engaged in tying practices that deprive interexchange carriers ("IXCs") and end users of the economic benefits of price competition, enhanced service offerings and a choice of service providers. Similarly, there is no merit to the allegation that alternatives to the local loop render unbundling unnecessary. No evidence was presented that competitive carriers are able to reach the vast majority of telecommunications users on a cost-effective basis except through the incumbent LECs' local loop facilities.

To the extent that parties disagree with the specifics of MFS' technical and pricing proposals, their objections should be raised in the context of the rulemaking proceeding itself.

[2/] Some LECs contend that the Commission should focus its attention on access charge and universal service funding reform rather than loop unbundling. *See e.g.*, USTA Comments at 1-2; BellSouth Comments at 18-19; GTE Comments at 44-50. These arguments should be rejected out of hand. The subject of this proceeding is MFS' Petition. The LECs can advance their agendas elsewhere, and indeed have already done so. Commission consideration of the instant Petition in no way precludes simultaneous consideration of other issues relating to local exchange competition, including those raised by the LECs.

The rulemaking will provide a forum to address the merits of MFS' proposed rules and any alternatives to those proposals. The Commission need not resolve the disagreements at this juncture.

MFS has made a compelling showing of the need for local loop unbundling and the adoption of associated pricing and technical rules. The Commission should grant its Petition without further delay.

I. UNBUNDLING OF THE LOCAL LOOP IS IN THE PUBLIC INTEREST AND WILL FURTHER THE GOALS OF THE COMMUNICATIONS ACT

A. Commission Action Is Necessary To Promote Competition In The Switched Access Market

None of the commenters disputes that incumbent LECs continue to have unrestrained monopoly control over the local loop -- the vehicle by which competitive local exchange carriers obtain virtually all of their access to end user customers. MFS demonstrated in its Petition that unbundling of the common line element from the switching and transport elements of local exchange service will facilitate the development of competition in the interstate and local switched access markets and provide the opportunity for customers to have a choice of carriers for the origination and termination of both interstate and local calls. The Commission has consistently found, and no party has seriously challenged, that competition in the provision of telecommunications facilities and services promotes the Commission's statutory objective of making available, so far as possible, efficient, nationwide communications service with adequate facilities at reasonable prices to all people of the United States. 47 U.S.C. § 151. Experience has proven that competition creates incentives for LECs to operate more efficiently and improve responsiveness to customer needs and demands. In addition, the availability to customers of a choice of providers has led inevitably to increased service options, lower prices and the faster implementation of innovative technologies.[3] Competition in the switched access market, made possible by unbundling of the local loop, is certain to produce similar consumer benefits.

At least one LEC -- Ameritech -- agrees that unbundling of the local loop is in the public interest.[4] Some State Regulatory Commissions and LECs contend, however, that Commission action is unnecessary because states are actively working to open the local exchange market to competition.[5] MFS commends such pro-competitive initiatives. What it has asked the Commission to do is complement, not supplant, the actions taken by states to foster the development of competition.

The removal of legal and regulatory barriers on the state level creates the potential for interexchange carriers and business and residential customers to enjoy the benefits that competition can provide, including a choice of service providers, lower prices, expanded service options and enhanced efficiency. As MFS demonstrated in its Petition, however, for this potential to be realized -- i.e., for competition to actually develop and flourish -- competitive local exchange carriers must have access to unbundled loops. Unfortunately, such access does not automatically follow the elimination of the *de jure* local exchange monopoly. It is for this reason that the Commission must adopt policies and rules requiring Tier 1 LECs to unbundle

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3/ *See e.g.*, *Expanded Interconnection With Local Telephone Facilities*, 7 FCC Rcd 7369, 7378, 7380 (1992), *modified as to other issues*, 8 FCC Rcd 127 (1992), *further modified*, FCC 93-379 (released Sept. 2, 1993), *vacated in part on other grounds sub nom. Bell Atlantic Telephone Companies v. F.C.C.*, 24 F.3d 1441 (D.C. Cir. 1994).

4/ *See* Ameritech Comments at 2.

5/ *See* NARUC Comments at 9; PAPUC Comments at 6-7; NYDPS Comments at 3-4; MDPSC Comments at 2-5; USTA Comments at 2; Ameritech Comments at 4-7; Pacific Companies at 3-4; NYNEX Comments at 10-11; BellSouth Comments at 4-5; Bell Atlantic Comments at 2.

the local loop in states where competition has been authorized. Such action will perpetuate the Commission's leadership role in encouraging the development of local competition, carrier choice for customers and increased competition in the provision of interexchange access services.

According to GTE, "fifteen states have either authorized competition for local exchange service or have an open proceeding to address, or otherwise establish, ground rules for local competition." (GTE Comments at 44) Nonetheless, only four states -- New York, Iowa, Michigan and Illinois -- have thus far ordered LECs to offer loops on an unbundled basis to competitive local exchange carriers.[6] Moreover, unbundled loops are currently available only in New York.[7]

NYNEX has proven that loop unbundling is technically and economically feasible, and Ameritech has asserted the same in its Illinois Customers First tariff case.[8] If the Commission does not assume a nationwide policy leadership role, competitive local exchange carriers will be forced to adjudicate the issue of loop unbundling on a state by state basis. This will not only significantly delay the development of competition, but it will also divert precious resources that could be better expended on the improvement of the telecommunications infrastructure. The

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[6] *See Proceeding on Motion of the Commission Regarding Comparably Efficient Interconnection Arrangements for Residential and Business Links*, 152 PUR 4th 193 (NY PSC 1994); *In re: McLeod Telemanagement Inc.*, (Iowa Utilities Board, March 31, 1995, petition for rehearing pending); *In the matter of the application of CITY SIGNAL, INC., for an order establishing and approving interconnection arrangements with Michigan Bell Telephone Company*, Case No. U-10647 (MI PSC, February 23, 1995); *Illinois Bell Telephone Company, Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois*, Docket Nos. 94-0096, *et al.* (Ill. Comm. Comm'n April 7, 1995).

[7] NYNEX has recently entered agreements to provide unbundled loops to competitive local exchange carriers in Massachusetts also. As a practical matter, however, New York remains the only state where unbundled loops are currently provisioned.

[8] *See n. 6, supra.*

Commission clearly has the jurisdiction to act. It should exercise that jurisdiction to create the competitive opportunities that will provide the impetus for a further expansion of private investment in the telecommunications infrastructure and the deployment of state-of-the-art technologies that will enable the delivery of innovative applications and enhanced services.

B. Bundling Of The Local Loop Is Per Se Unlawful Under Antitrust Principles and Hence Is Contrary To The Public Interest

In its Petition, MFS cited to an unbroken string of Supreme Court antitrust decisions, spanning the last half-century, that hold tying arrangements per se unlawful because of their "pernicious effect on competition" and "lack of any redeeming virtue."[9/] While most of the LECs are willing to accept this statement of hornbook law, SWBTC argues that "many courts" have concluded "that tying arrangements in pricing should be presumptively lawful" and chides MFS because MFS "has not cited any of these courts." (SWBTC Comments at 30-31). The reason MFS did not cite "any of these courts," but instead relied upon approximately a dozen cases from the Supreme Court and Courts of Appeals holding tying arrangements per se unlawful, is that there are no such court opinions -- and SWBTC cites none -- concluding that tying arrangements are "presumptively lawful."

Although several LECs contend that certain of the factual elements of MFS' tying theory are absent, as MFS showed in its Petition, all four elements of a per se unlawful tying arrangement are present here.

9/ It bears repeating that the Commission need not find a violation of the antitrust laws in order to proceed with the proposed rulemaking. The public policies embodied in the antitrust laws are simply one of the factors -- albeit, in this case, a particularly persuasive one -- that the Commission should consider in determining how to promote the public interest under the Communications Act.

The LECs devote their principal efforts to trying to show that the loop and the port are one product, not two. Ameritech and NYNEX argue that since LECs have refused to unbundle the loop from the port, the loop and the port must be a single product. (Ameritech Comments at 15; NYNEX Comments at 21) This contention is factually incorrect as shown by their own Comments. NYNEX "already offers unbundled local loops in its New York State tariffs" and Ameritech "is implementing local loop unbundling in Illinois and Michigan." (NYNEX Comments at 2; Ameritech Comments at 2) This contention is also nonsensical. The uniform adoption of an illegal practice by a group of sellers (all of whom were not long ago a single entity) cannot render the practice legal.

In fact, as shown in MFS' Petition, the legal focus in determining whether one or two products exist is properly upon whether buyers (not sellers) perceive the products as distinct. NYNEX and Ameritech appear to recognize the importance of differentiation in the eyes of the buyer, but contend that MFS has failed to show separate demand, other than its own, for loops and ports.[10/] This, too, is nonsense. At the request of MFS and other competitive local exchange carriers such as McLeod Telemanagement, Inc., Teleport Communications Group, City Signal, Inc., Cablevision Lightpath, Inc., and IXCs such as AT&T Corp., MCI Telecommunications Co., and Sprint Communications Co., unbundling has been ordered in New York, Illinois, Michigan, and Iowa.[11/] Indeed, the Commission need not look beyond the

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10/ SWBTC takes a different tack, alleging (without support) that MFS would be unwilling to pay the price demanded by LECs and therefore its demand is "zero." (SWBTC Comments at 36-37). SWBTC's theory makes no sense on the facts of this case. There could only be logic underlying SWBTC's argument if MFS had turned down unbundled loops offered by SWBTC or another LEC.

11/ As noted, NYNEX has also agreed to provide unbundled loops in Massachusetts at the request of competitive carriers.

comments already filed in this proceeding to see conclusive proof of the demand for unbundling.[12/]

While the other LECs appear to concede that MFS' petition has made an adequate showing as to the other elements of a per se unlawful tying arrangement, SWBTC also challenges MFS on the "market power" element. Without support, SWBTC contends that LECs lack market power merely because they are regulated, but concedes that market power would be shown if their prices for access services "are inefficiently high." (SWBTC Comments at 39-40). In fact, LECs' access prices are "inefficiently high" -- even the LECs themselves have frequently contended that their access rates are higher than could be sustained in a full competitive market.[13/]

Thus, MFS has shown that under the letter and the spirit of the antitrust laws, the LECs' bundling of the local loop is a per se illegal tying arrangement and hence contrary to public policy.[14/]

[12/] The fact that competitive local exchange carriers may seek to combine their own ports with the LECs' loops or their own loops with the LECs' ports is irrelevant. Separate product or service markets have repeatedly been held to exist even where the buyer seeks to provide the tied product or service itself. E.g. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S.Ct. 2072, 2080 (1992); Service & Training, Inc. v. Data General Corp., 963 F.2d 680, 684 (4th Cir. 1992); Advanced Computer Services v. MAI Systems Corp., 845 F. Supp. 356, 368 (E.D.Va. 1994).

[13/] *See e.g.*, Comments of Southwestern Bell Telephone Company in CC Docket No. 94-1 at 72 (May 9, 1995) ("LEC access prices are inefficient and do not reflect their relative incremental costs"); Comments of the Pacific Companies at 7 ("[w]e have long urged the Commission to reform the interstate access structure and eliminate inappropriate subsidies, such as the CCL, in the current structure").

[14/] NYNEX also argues that the antitrust laws are inapplicable because they must "defer to state regulatory policy," citing California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980). But there, immunity was predicated upon a showing that the challenged restraint (mandatory resale price maintenance by wine producers and wholesalers) was "clearly articulated and affirmatively expressed as state policy." Id. at 105. There is no similar showing here that any state (continued...)

II. ALTERNATIVES TO THE LOCAL LOOP DO NOT CURRENTLY EXIST

In its Petition, MFS showed that the local loop remains a quintessential bottleneck facility. Certain LECs and the MDPSC[15] take issue with MFS' position, arguing that there are viable alternatives to the local loop. Relying on various press reports as evidence, these parties contend that existing and planned CAP networks, proposals by cable companies to offer telephony and the potential of PCS and other wireless services to compete in the local exchange market somehow prove that it is economically feasible for competitive providers to replicate the LEC networks. This argument ignores reality and flies in the face of the findings of the State regulatory bodies that have ordered loop unbundling.

The local loop distribution network has been built over the course of more than 100 years with ratepayer funds and provides connections to almost 100 million locations. Incumbent LECs cannot deny that they are the sole providers of service between the vast majority of telephone customers and their central offices. As the NYDPS concluded when it ordered NYNEX to offer unbundled loops:

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[14](...continued)
has imposed a "clearly articulated and affirmatively expressed" policy requirement that LECs must bundle loops and ports. See Cantor v. Detroit Edison Co., 428 U.S. 579, 594-95 (1976) (PSC's approval of a tariff proposed by a regulated utility entailing bundling of electric light-bulbs with electricity does not provide immunity. For immunity to be available, the PSC's "participation" in the bundling decision must be "so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it.")

Several LECs also devote considerable energy to disproving claims never asserted by MFS, such as purported "essential facilities" violations or other violations of § 2 of the Sherman Act. (E.g., SWBTC Comments at 11-14; GTE Comments at 8-23; Ameritech comments at 16-17). These LECs have erected a "straw man" in the form of a theory not asserted by MFS that they believe they can knock down. These arguments against the "essential facilities" theory not raised by MFS do nothing to detract from the strength of MFS' tying argument.

[15] NYNEX Comments at 4-7; BellSouth Comments at 6-9; Bell Atlantic Comments at 8-10; GTE Comments at 12-19; SWBTC Comments at 6-11; MDPSC Comments at 9-11.

> [W]hile the potential impact on both the local telephone company and its ratepayers of widespread link competition from other sources such as cable television or wireless may appear significant in the abstract, the lack of functional competitive infrastructure makes it unlikely that alternative providers will soon be commonplace.

Proceeding on Motion of the Commission Regarding Comparably Efficient Interconnection Arrangements for Residential and Business Links, supra, 152 PUR 4th at 199. Similarly, the Illinois and Michigan regulatory commissions have concluded that competitive local exchange providers must have access to unbundled loops because duplication of the existing LEC networks is not economically viable. *See Illinois Bell Telephone Company, Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, supra,* at 47 ("[u]nbundling . . . can reduce the overall societal cost of providing telecommunications services by enabling new entrants to avoid wasteful duplication of incumbent LEC facilities for which competitive provisioning may not be economically viable"); *In the matter of the application of CITY SIGNAL, INC., supra,* at 58 (unbundling of the local loop is necessary because "certain incumbent LEC facilities will continue to be bottleneck facilities even for competing facilities-based LECs for some time into the future").[16/]

In asserting that cable and wireless represent viable alternatives to the LECs' local loop facilities, MDPSC and the LECs rely on predictions of future events -- including publicized plans to invest in system upgrades or (in the case of wireless) the construction of new networks. Whether or not these potential new entrants will succeed in making inroads into the local

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[16/] SWBTC and GTE assert that MFS' submissions in a certification proceeding in Texas constitute an admission that unbundled loops are not essential facilities. (SWBTC Comments at 6-8; GTE Comments at 20-21) The Commission need not decide whether unbundled loops are "essential facilities" in the context of the antitrust laws. The fact remains that the available substitutes for unbundled loops are economically and technically inferior (MFS Petition at 6-12) and nothing in the materials cited by SWBTC and GTE is inconsistent with that fact.

exchange market over the next several years is far from certain.[17] At the present time, however, they do not have facilities in place comparable to the nationwide LEC networks. Likewise, no existing CAP network or combination of existing CAP networks has the ubiquitous reach of the incumbent LECs' networks. Perhaps the strongest evidence of the absence of alternatives to the LEC bottleneck is that many of the cable, wireless and other competitive providers referenced by MDPSC and the LECs, including Sprint, Cox Cable, Teleport, MCI and AT&T, have filed comments supporting MFS' Petition For Rulemaking.

GTE maintains that the Department of Justice has taken the position that "creation and maintenance of dual local networks is viable today," citing an interview with Assistant Attorney General Anne Bingaman published in *The Wall Street Journal*, in which she stated that "two-wire competition" is critical. (GTE Comments at 19) GTE disingenuously fails to mention that Ms. Bingaman's discussion of "two-wire competition" related to competition between telephone companies and cable firms in the provision of <u>cable television service</u>, not the provision of local telephone service. Rather than advocating the replication of existing local exchange facilities, as GTE asserts, Ms. Bingaman has testified before Congress that the "Administration strongly supports" a national policy to open the local loop, including the "implementation of unbundling

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[17] MDPSC acknowledges this uncertainty when it states that "[c]ellular radio <u>could</u> become an effective competitor to the local exchange <u>if</u> prices for equipment and service continue to fall," "PCS <u>may</u> make possible the provision of multiple wireless loop providers" and "cable television service franchise[s] <u>may offer</u> loop services in competition with the LECs." (MDPSC Comments at 10, emphasis added)

and other arrangements for resale of local service on terms that make competition in local markets feasible."[18]

BellSouth, SWBTC and GTE also maintain that unbundling is not necessary because the special access and private line channels that they currently offer under tariff are equivalent to unbundled local loops.[19] MFS refuted these allegations in its Petition by demonstrating that functional, operational, technical and pricing differences make special access and private lines unacceptable substitutes for unbundled loops.[20] Special access and private lines include features and functionalities that competitive local exchange carriers simply do not want or need to provide voice-grade service. Significantly, not one LEC disputes that the additional costs imposed by these unwanted and unnecessary features make special access and private lines far more expensive than unbundled loops. In any event, the fallacy of the LECs' position is obvious. If special access and private lines were effective substitutes, MFS would not be before the Commission, the Department of Justice would not be advocating loop unbundling to open the local market and State Regulatory Commissions would not be ordering their carriers to offer unbundled loops.[21]

18/ *Telecommunications Reform Legislation: Hearings Before the Senate Comm. on Commerce,* 104th Cong., 1st Sess. (March 2, 1995) (Statement of Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, at 14-15).

19/ *See* BellSouth Comments at 9-15; SWBTC Comments at 8-9; GTE Comments at 23-29.

20/ NYNEX also contends that a "WATS access line" constitutes the functional equivalent of an unbundled loop. (NYNEX Comments at 14) MFS cannot respond to NYNEX's allegation because, as NYNEX admits, its tariff "does not list WATS access lines as being available for interconnection to a collocator's multiplexing node." Id.

21/ The Michigan Public Service Commission specifically rejected Ameritech's argument that its tariffed special access and private line services provided viable alternatives to unbundled loops. *See In the matter of the application of CITY SIGNAL, INC., supra,* at 57-60.

III. THE COMMISSION HAS JURISDICTION OVER THE COMMON LINE ELEMENT OF SWITCHED ACCESS SERVICE AND THE AUTHORITY TO PREEMPT STATE REGULATION OF TECHNICAL AND INTERCONNECTION ISSUES

A. Commission Promulgation of Unbundling and Technical Rules Will Not Impermissibly Usurp the States' Jurisdiction

MFS demonstrated in its Petition that the Commission has jurisdiction to order unbundling of the common line and adopt technical and interconnection issues relating to loop unbundling. In the *Expanded Interconnection* rulemaking, the Commission properly exercised its jurisdiction, pursuant to §§ 152(a) and 201 of the Communications Act, 47 U.S.C. §§ 152(a), 201, to require the LECs to unbundle, and provide direct interconnection to, special access circuits and trunkside connections to tandem and end office switches. With this partial unbundling of the LEC network, it became technically and economically feasible for customers to combine their own or CAP transport facilities with the LECs' switching facilities. The expanded interconnection rules removed an unnecessary barrier to competition by relieving customers and competitive switched access carriers from the obligation to purchase services and functionalities they did not need to obtain a service comparable to that provided by the LECs. Unbundling of the local loop will complete the process. The availability of lineside interconnection to the LECs' networks will allow competitive local exchange carriers to combine their switching and transport facilities with the LECs' loop facilities and similarly relieve them of the obligation to purchase services and functions they do not need to provide interstate switched access service.

Some State Regulatory Commissions and certain LECs assert that the Commission does not have jurisdiction to order Tier 1 LECs to offer unbundle loops or to establish uniform technical and interconnection standards.[22] They contend that Section 152(b) of the Communications Act, 47 U.S.C. § 152(b), reserves jurisdiction over the local loop exclusively to the States and bars the Commission from taking any action that would impact intrastate communications or competition in the local exchange market. This position must be rejected as unsupported by the case law.

Contrary to the perception of the State Regulatory Commissions and the LECs, MFS has not asked the Commission to preempt state authority over local exchange service. MFS has asked the Commission to adopt rules for the unbundling of the local loop that would be applicable only where states have already acted to authorize competition in the local exchange market. The rules would not in any way limit the States' ability to regulate entry in the local exchange market, or to regulate price and other terms and conditions of local exchange service. Thus, there would be no federal intrusion in intrastate matters arguably subject to the exclusive jurisdiction of the states.

Although certain parties argue otherwise, there is no question that unbundling of the local loop involves matters of federal as well as state jurisdiction. The states may regulate the pricing of the intrastate portion of the local loop, but the Commission has plenary jurisdiction over the physical plant because the identical plant is used to originate and terminate both interstate and intrastate communications. 47 U.S.C. §§ 152(a), 153. *Louisiana Public Service Comm'n v. F.C.C.*, 476 U.S. 355 (1986), the principal case on which the parties rely, confirms that the

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[22] *See* NYDPS Comments at 2-6; PAPUC Comments at 2-5; NARUC Comments at 5-8; BellSouth Comments at 15-16; Bell Atlantic Comments at 2-5; SWBTC Comments at 2-5. NYNEX, however, concedes that the Commission has authority "to require LECs to offer unbundled loops in their interstate tariffs." (NYNEX Comments at 15)

Commission may regulate the subject matter and preempt state regulation where the interstate and intrastate components of the Commission's regulation cannot be separated. *Id.* at 375, n.4. Given the dual use of the local loop, it would not be possible to separate the loop itself into interstate and intrastate components -- for example, to have the loop unbundled for one jurisdiction but not the other, or to have differing technical parameters for the two jurisdictions -- without requiring one line for intrastate calls and a different line for interstate calls. As a result, and consistent with a long line of precedent, the Commission may exercise its jurisdiction to require LECs to unbundle the local loop and to adopt uniform technical standards for interconnection. *See e.g., National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 880 F.2d 422 (D.C. Cir. 1989) (Commission may require states to unbundle inside wiring from basic transmission service in order to encourage competition in the provision, installation and maintenance of inside wiring used for both intrastate and interstate communications); *Puerto Rico Telephone Co. v. F.C.C.*, 553 F.2d 694 (1st Cir. 1977) (even though PBX equipment used predominantly for intrastate calls, Commission may preempt state restrictions on interconnection of PBX equipment and facilities); *North Carolina Utilities Comm'n v. F.C.C.*, 552 F.2d 1036 (4th Cir.), *cert. denied,* 434 U.S. 874 (1977) (Commission may preempt state regulation of interconnection of terminal equipment used for both interstate and intrastate communications).

In asserting that the intrastate nature of the local loop precludes the Commission from establishing uniform technical and interconnection standards, PAPUC, NYDPS, SWBTC, BellSouth and Bell Atlantic read the Communications Act too narrowly. Section 201 of the Act expressly authorizes the Commission to order common carriers to establish physical interconnection with other carriers and this authority is not limited by Section 152(b) where, as here, the physical plant is not separated by intrastate and interstate use. *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, 63 RR 2d 7, 13-14 (1987), *aff'd on recon.*, 66 RR 2d 105 (1989). In an analogous situation, the Commission has exercised this authority to regulate the interconnection of cellular carriers to the LECs' landline local exchange networks. *Id.* Like competitive local exchange carriers, cellular carriers provide local and intrastate, as well as interstate, telephone service. The Commission specifically rejected the arguments put forth by the LECs' that the intrastate nature of cellular service deprived it of jurisdiction over interconnection issues. On the contrary, the Commission found that state regulation in the interconnection area could substantially affect the development of interstate communication and that without a nationwide policy governing the interconnection of cellular systems, delivery of interstate service could be impaired. *Id.*

NYDPS' and SWBTC's attempts to distinguish the Commission's prior interconnection and unbundling decisions are unavailing. NYDPS contends that the interconnection cases dealt with the issue of "connection of customer provided equipment . . . to the national telephone network" where "[i]t was not possible to separate the intrastate and interstate components of such regulations" whereas the "issue here concerns the development of local competition, not how and whether customers will have access to the interstate network." (NYDPS Comments at 5-6) NYDPS' argument misconstrues MFS' request for relief. The whole premise of MFS' Petition does indeed concern how competitive local exchange carriers will have access to the interstate network. While the availability of unbundled loops will foster competition in the local exchange market (as well as the interstate access market), purchasers of such loops will still have to interconnect to the nationwide telephone network and use those loops for the origination and termination of interstate calls. It is no more possible to separate the interstate and intrastate components of unbundled loop interconnection regulations than it was to separate the interstate and intrastate components of the interconnection regulations at issue in the cases cited by NYDPS.

SWBTC asserts that the Commission's decisions to require unbundling of CPE and inside wiring were based on the determination that these "items were not common carriage regulable under Title II of the Communications Act" and are therefore inapplicable to local loop service, which does constitute common carriage. (SWBTC Comments at 3, emphasis in original) SWBTC's argument is both misguided and irrelevant. The courts reviewing the inside wiring and CPE decisions held that the Commission's authority to require unbundling derives from Title I of the Act, which confers jurisdiction over "instrumentalities, facilities [and] apparatus" incidental to the transmission of interstate communications. 47 U.S.C. §§ 152(a), 153. Moreover, the court reviewing the inside wiring decision rejected the Commission's common carriage argument while the court reviewing the CPE decision upheld the Commission's power to forbear from regulating the rates of carrier-provided CPE, which was subject to regulation under Title II. *See National Ass'n of Regulatory Utility Comm'rs v. F.C.C.*, 880 F.2d at 428-431 (D.C. Cir. 1989); *Computer Communications Industry Ass'n v. F.C.C.*, 693 F.2d 198, 211, 214 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Public Service Commission v. F.C.C.*, 461 U.S. 968 (1983). In addition, SWBTC's contention that the Commission cannot "'unbundle' one segment of common carriage . . . from other segments of common carriage" is simply wrong. The Commission did just that when it promulgated the expanded interconnection rules.

The Commission can and should exercise its jurisdiction to adopt uniform technical interconnection standards. Uniform standards for interconnection to unbundled loops are necessary to protect the integrity and interoperability of the national public switched telecommunications network. As was the case with cellular service and special access, inconsistent state interconnection policies could impair the delivery of interstate service.[23/] AT&T accurately has observed that "[t]he objective of encouraging and fostering competitive entry into the switched access business . . . would dramatically and unnecessarily be undermined if a state could forbid the use of 'unbundled' local exchange elements for intrastate access or local competition."[24/] Inconsistent state regulations could also negate the Commission's long-standing policy of promoting a telecommunications user's right to interconnect freely with the public interstate network and of promoting the efficient utilization of that network through competition. *See e.g., North Carolina Utilities Comm'n v. F.C.C.*, 537 F.2d 787 (4th Cir.), *cert. denied,* 429 U.S. 1027 (1976); *Puerto Rico Telephone Co. v. F.C.C., supra; Public Utility Comm'n of Texas v. F.C.C.*, 886 F.2d 1325 (D.C. Cir. 1989).

NYNEX's contentions that it "is still addressing the operational procedures associated with providing unbundled analog copper loops," "has not installed any loops over pair gain technology as of this date" and is still "working on the operational issues associated with providing such interconnection" (NYNEX Comments at 17) reinforce the need for uniform standards. A Commission resolution of these issues on a national level would be far more

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23/ PAPUC contends that uniform technical interconnection standards are unnecessary because "[l]ocal service does not involve transmissions between States." (PAPUC Comments at 7) While local calling service may not involve transmissions between States, the local loop itself is integral to the origination and termination of transmissions between States.

24/ AT&T Comments at 14.

efficient than the alternative. In the absence of uniform standards, individual states will have to institute proceedings to address and resolve the same interconnection issues repeatedly, a process that will further delay the availability of unbundled loops.[25]

B. Commission Jurisdiction Over Interstate Pricing Issues Has Not Been Challenged

MFS has asked the Commission to adopt rules addressing the interstate common line charges for unbundled loops. While a number of parties disagree with the specifics of MFS' proposal,[26] no party has questioned the Commission's jurisdiction to determine how interstate End User Common Line and Carrier Common Line charges will be assessed and calculated for unbundled loops. The Commission need not consider the merits of the parties' alternative positions at this time. Institution of a rulemaking will allow the development of a full record on the interstate pricing issues and provide all parties an opportunity to present their proposals.

Ameritech and the Pacific Companies argue that the Commission should resolve the appropriate application of the interstate charges on a case-by-case basis through the waiver process rather than generically through a rulemaking.[27] This proposal makes no sense. There is no reason for the Commission to use the waiver process to resolve an issue that will confront

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[25] NYDPS suggests that the Commission make non-binding recommendations on interconnection and unbundling standards to assist interested states. (NYDPS Comments at 6) Because the Commission has jurisdiction over the technical issues, it need not so limit its action.

[26] *See e.g.*, NYNEX Comments at 12-13; BellSouth Comments at 18; Pacific Companies Comments at 6-8; SWBTC Comments at 46-47; GTE Comments at 49-50; PAPUC Comments at 8-9.

[27] Ameritech Comments at 10-11; Pacific Companies Comments at 6.

all Tier 1 LECs. PAPUC, NYNEX and GTE endorse a rulemaking as the appropriate vehicle for the Commission to address the recovery of interstate common line charges.[28]

C. The Commission Can and Should Adopt Voluntary Pricing Standards For Use by States

Although the States have jurisdiction over the pricing of unbundled loops in intrastate tariffs, the Commission should exert a leadership role by adopting voluntary guidelines for pricing and cost imputation. As MFS demonstrated in its Petition, the availability of unbundled loops, standing alone, is insufficient to promote competition in the interexchange access and local exchange markets. Unbundled loops must be priced in a manner that prohibits LECs from implementing anticompetitive pricing policies that will perpetuate their monopoly control of the interexchange access and local exchange markets.

NYDPS affirmatively recognizes the need for an imputation standard and acknowledges that States could benefit from the Commission's expertise if such guidelines were adopted.[29] PAPUC and MDPSC, on the other hand, assert that the Commission should refrain from action because the States are better equipped to address local pricing issues.[30]

It is extremely noteworthy that the one Commission that has experience with unbundling issues acknowledges the potential value of voluntary guidelines. The concerns raised by PAPUC and MDPSC are alleviated by the flexibility of MFS' proposed guidelines, which do not preclude the States from adapting the standards to local pricing conditions and policies, or from rejecting them altogether.

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[28] PAPUC Comments at 9; NYNEX Comments at 2; GTE Comments at 49-50.

[29] *See* NYDPS Comments at 7-8.

[30] *See* PAPUC Comments at 5-6; MDPSC Comments at 5-7.

Not surprisingly, the LECs uniformly oppose voluntary guidelines premised on cost-based rates or an inverse imputation standard. Some contend that cost-based pricing and imputation will adversely affect universal service funding and require them to subsidize their competitors.[31] The pricing standards adopted by States that have ordered unbundling, however, incorporate the very concepts that these LECs allege are unworkable and inappropriate. NYNEX confirms in its Comments that NYDPS requires that unbundled loops be offered at cost-based rates. (NYNEX Comments at 9) Illinois' pricing rule provides that the sum of the prices for the unbundled portions of the exchange access line -- i.e., the loop, port and monthly connection charges -- cannot exceed the total price of the bundled line. *Illinois Bell Telephone Company, Proposed Introduction of a Trial of Ameritech's Customers First Plan in Illinois, supra,* at 60. And Michigan has concluded that Total Service Long Run Incremental Costs ("TSLRIC") should be applied to determine the price for unbundled network functions. *In the matter of the application of CITY SIGNAL, INC., supra,* at 61-63.

MFS' pricing guidelines would ensure that a LEC recovers its incremental cost in providing unbundled loops. No LEC would be required to offer unbundled loops at below cost prices unless it also offers bundled network access lines at below cost prices. To the extent that local exchange revenues subsidize the cost of universal service, those costs can and should be recovered through a competitively neutral mechanism, such as a universal service fund to which all carriers contribute. Both the Commission and many States are examining universal service issues in separate proceedings and this should not preclude the adoption of voluntary guidelines for the pricing of unbundled loops.

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[31] *See* GTE Comments at 35-40; NYNEX Comments at 9-11; SWBTC Comments at 47-57.

The comments on specific elements of MFS' voluntary pricing guidelines can be addressed in the context of the rulemaking proceeding. At this point, the only issue the Commission need resolve is whether a rulemaking is warranted. The ability of the incumbent LECs to price unbundled loops so high that new entrants could not offer a competitive price for interexchange access and local exchange service compels Commission action.

IV. TECHNICAL STANDARDS

MFS demonstrated in its Petition that loop unbundling will not require a significant development of new standards, hardware upgrades or software changes. MFS proposed that incumbent LECs continue to use primarily the same technical practices they are using today in order to simplify implementation of the services.[32/] Although Bell Atlantic, GTE and SWBTC allege that unbundling and interconnection will introduce technical problems, create network inefficiencies and increase costs significantly,[33/] their claims are belied by the representations of other LECs who have experience with unbundling. By way of illustration, NYNEX states that it has successfully unbundled "business and residence exchange services into 'link' and 'port' components. (NYNEX Comments at 5) In anticipation of offering unbundled loops when local competition is authorized, the Pacific Companies state that they "have performed technology tests, successfully, of unbundled links and ports," illustrating that unbundling will

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32/ Ameritech objects to MFS' proposed technical standards on the grounds that "the method by which unbundled loops are provided or where pair gain devices are employed is an internal business decision" that should not be made by third party providers. (Ameritech Comments at 12) This objection is not well taken. MFS has not proposed that purchasers of unbundled loops dictate how a LEC provisions its network. Instead, it has recommended that interconnection be accomplished with minimal changes to existing technical standards and procedures.

33/ *See* Bell Atlantic Comments at 7; GTE Comments at 40, Attachment 1; SWBTC Comments at 40-45.